

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

NATIONAL CAPTIONING INSTITUTE, INC.

and

Cases 16-CA-182528
16-CA-183953
16-CA-187150
16-CA-188322
16-CA-188346

NATIONAL ASSOCIATION OF BROADCAST
EMPLOYEES & TECHNICIANS – COMMUNICATION
WORKERS OF AMERICA, AFL-CIO

Bryan Dooley, Esq.,
for the General Counsel.
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Arthur T. Carter, Esq. (Littler Mendelson P.C.),
for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This case was tried in Fort Worth, Texas on May 8 and 9, 2017. The complaint alleged that the National Captioning Institute, Inc. (NCI or the Respondent) violated §8(a)(1) and (3) of the National Labor Relations Act (the Act). On the entire record, including my observation of the witnesses' demeanors, and after considering the parties' post-hearing briefs, I make the following¹

FINDINGS OF FACT²

I. JURISDICTION

At all material times, NCI, a non-profit corporation, with offices in Dallas, Texas (the TX office), Santa Clarita, California (the CA office) and Chantilly, Virginia (the DC office), has provided closed-captioning, subtitling and other media services. Annually, it derives gross revenues in excess of \$100,000, and purchases and receives at its offices goods valued in excess of \$5,000 directly from out-of-state points. It, therefore, admits, and I find, that it is an employer engaged in commerce, within the meaning of §2(2), (6) and (7) of the Act.

¹ NCI's unopposed *Motion to Correct Transcript Errors* is GRANTED and ADMITTED as R. Exh. 50. NCI was previously ORDERED to submit R. Exh. 50 to the court reporter for inclusion in the record.

² Unless otherwise stated, factual findings arise from joint exhibits, stipulations and undisputed evidence.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

NCI services national broadcasters, cable TV networks, corporations and universities. It is run by: Chairman and CEO Gene Chao; President and COO Jill Toschi; Vice President for Administration and HR Beth Nubbe; and Director Meredith Patterson. It employs about 200 employees in the following positions: steno captioners;³ voice captioners;⁴ engineers; and schedulers. Captioners often work remotely, once competency has been established.

In early-2016,⁵ the National Association of Broadcast Employees & Technicians–Communication Workers of America, AFL–CIO (the Union) attempted to unionize NCI’s TX and CA offices. COO Toschi learned about this drive in early May and promptly notified CEO Chao. (GC Exhs. 2–3). This case mainly involves NCI’s reaction to the Union’s organizing drive, which included its decision to fire 2 Union supporters, Janice Marie Hall and Mike Lukas.

B. NCI’s Efforts to Monitor Employees’ Union Activities

In May, Toschi began searching employees’ chat logs on the Spark Messenger System (Spark) for Union discussions.⁶ (GC Exhs. 4, 8, 10; Tr. 36). Chao also ran his own searches. (GC Exh. 7). On August 15, Chao asked Toschi to summarize her findings, which resulted in Hall being identified as a Union adherent. (GC Exh. 9). On June 23, Crystal Anderson, a non-supervisor, emailed Patterson and revealed that a coworker invited her to join the Union’s Facebook page. (GC Exh. 11). She informed Patterson that: 18 employees, including Lukas, had already joined the Facebook page; and that a Union meeting was set for June 29. Patterson forwarded this email to Toschi. (Id.).

C. Toschi’s Email to Management

On June 26, Toschi sent this email to NCI management about the Union:

[E]mployees have been attempting to [unionize]

There are a considerable number of employees ... that have expressed interest [The] union ... will be holding a meeting on June 29....

[T]he threat is serious. NCI's position ... is solidly against unionization. I will be sending a company-wide communication to this effect

³ They stenographically create closed-captioning for live broadcasting.

⁴ They recite a broadcast into voice recognition software, which converts their oration into closed-captioning.

⁵ All dates are hereinafter in 2016, unless otherwise stated.

⁶ She said that she did not generally search employees’ Spark logs before the Union campaign. (Tr. 72).

I want you to restrict your comments [to the following]:

- NCI is against the union involvement
- Employees have the right to participate or not
- Employees who feel ... coerced should let their manager know
- 5 • Unionization would increase costs ... that could be better used on reinvestment in the company and its employees
- Unionization does not guarantee increased salaries but does guarantee that employees have to pay union dues

10 (GC Exh. 18).

D. Anti-Union Email to Employees

On June 28, Toschi sent this email to NCI's workforce:

15 Our ... path to success ... is in jeopardy. There is an outside force trying to ... restrict direct contact ..., muddle communication, and demand ... resources That force is the ... CWA

20 CWA is asking you to trust that if you pay mandatory dues, it will provide you better terms and conditions of employment [It] cannot make NCI agree to any term or condition of employment [and] can require you to go on strike....

25 I believe that ... CWA [is] unnecessary ... [and] would be ... detrimental

(GC Exh. 19).

E. Patterson's Interrogation⁷

30 On July 5, Patterson emailed Anderson and asked whether: she still had access to the Union's Facebook page; she knew anything about the upcoming meeting; and Brenna had posted anything. (GC Exh. 40). Anderson replied that Brenna was no longer posting.

F. Union's Reply to NCI's Anti-Union Email

35 On July 11, the Union's organizing committee, i.e., Lukas and 9 others, sent an email to NCI's workforce, which refuted Toschi's anti-Union points. (GC Exh. 23). On July 12, supervisor Patterson sent Toschi a mean-spirited synopsis of the Union's supporters, and made
40 unsubstantiated accusations of: mental health issues; "overly inflated ego[s];" harboring "grudges;" "passive-aggressive personality" disorders; laziness; and "eerie quietness."⁸ (Id.). She specifically derided Lukas as being "slow [and] unhappy." (Id.).

⁷ This matter was not pled as a violation, although it likely was. See generally *Westwood Healthcare Center*, 330 NLRB 935 (2000).

⁸ Toschi directed Patterson to prepare this report, on the basis of Chao's orders. (Tr. 86).

G. Decision to Close the TX Office and Announcement

In March, NCI began to weigh closing the TX office.⁹ (R. Exh. 1). By June 30, a final closure decision was made. Toschi, thereafter, announced meetings on July 7 and 8 about “the future of the Dallas facility.” (GC Exh. 20). Her announcement did not describe the upcoming meetings as being confidential, or hint at a forthcoming closure. (Id.).

On July 7, at various meetings, Toschi announced the TX office’s impending closing. (R. Exh. 5). She asked employees to refrain from repeating her announcement, in order to give her the first chance to broach this topic with other stakeholders. (Id.). She did not, however, tell employees not to discuss the news internally, threaten connected discipline, or indicate how long her external discussion ban would be effective. (Tr. 70–71). Within hours of the meeting, she emailed employees, re-announced the closure, and asked them to “keep this information confidential ... while we notify our affected clients and vendors.” (Tr. 82; GC Exh. 25).

H. Transfer Options Provided to TX Office Employees

Following the closure announcement, NCI distributed packets to TX office workers, which summarized their transfer options, and enclosed employment applications. Their options included applying for remote (i.e., work-at-home) jobs, or transferring to the CA and DC offices. On August 16, HR Representative Rochelle Johnson emailed workers and stated:

Each request was considered ... on the basis of a number of factors ..., including:

Productivity[,] Quality [,]Reliability [,]Disciplinary record [and]Seniority

Employees with a strong record ... will likely have their first-choice request honored. Employees with a markedly weak record ... may be denied their requests.... [M]ost employees have been granted their first-choice requests.

(GC Exh. 26).

I. Closure of the TX Office and Associated Discharges

The TX office closed on February 28, 2017. Out of the 33 affected workers, 2 transfers to the DC office were granted and 1 was denied, while 27 work-at-home requests were granted and 2 were denied (i.e., Hall and Lukas). (GC Exhs. 29–32).

J. Lukas’ Employment History

On October 8, 2015, Lukas began his employment at the TX office as a voice writer trainee. He was promoted to an intermediate on-air (IOA) slot before his September 16 firing.

⁹ The GC has not alleged that the TX closure decision was unlawful.

1. Union Activities

5 He participated in the Union's Facebook page and was listed as a supporter. His activity was reported to Toschi in June. (GC Exh. 11). He was also identified as an organizing committee member in the Union's July rebuttal email to Toschi. (GC Exhs. 19, 23, 24).

2. Written Warning about July 7 Incident

10 On July 7, Lukas and his family (i.e., wife and kids), and Michael Baker, a former NCI employee and friend, visited the Dallas Zoo. Following their outing, Baker returned to Lukas' home, where Lukas called into Toschi's closure announcement meeting, and placed the call on speakerphone, within Baker's earshot. Lukas credibly testified that he did not think that permitting Baker to hear the call was of issue because he: did not reasonably suspect that it
15 involved a closing; and rationally thought that it was non-sensitive.¹⁰ Following the call, and unbeknownst to Lukas, Baker texted an NCI supervisor and raised his independent concerns about the closing. The supervisor told Patterson, who duly informed Toschi. (GC Exh. 21).

20 On July 11, Toschi issued Lukas a written warning for allowing Baker to overhear her closure announcement. The warning issued, without her first questioning Lukas about his actions or rationale, or any further investigation. The warning described his actions as an "egregious breach of [his] duty of loyalty," and threatened that similar misconduct would result in his firing. (GC Exh. 22). Toschi stated that she was appalled and "disgusted" by his actions.¹¹ (Tr. 79). She expressed concern that Baker could have prematurely shared the
25 announcement with clients,¹² and said that she initially wanted to fire Lukas. She said that she was unaware that he was involved with the Union, before issuing his warning. (Tr. 369-70).¹³

3. Promotion

30 Following the closure announcement, Lukas was promoted to an IOA slot in July. (R. Exhs. 26-27). The promotion closely preceded his firing.

4. Termination

35 Following the closure meeting, Lukas applied for a remote position. On August 23, he was told that his "performance did not meet ... minimum requirements" and he would be fired

¹⁰ Lukas' testimony on these points was credited. *First*, he was a straightforward witness, with a stellar demeanor. *Second*, his credibility was buttressed by NCI counsel's inexplicable failure to cross-examine him, and leave his testimony generally un rebutted. *Third*, his contention that he had no way of knowing that the meeting involved the closing was rational, given that NCI permitted him to call in remotely, kept the topic a secret and failed to otherwise advise him that the call was confidential.

¹¹ Her testimony on this point was incredible; it appeared to be a self-serving exaggeration about a minor issue.

¹² There is no evidence that Baker communicated the announcement to clients.

¹³ Her testimony on this point was a misrepresentation, given that she was told by Patterson on June 23, i.e., about 2 weeks earlier, that Lukas was a member of the Union's Facebook page. See (GC Exh. 11).

effective September 16. (GC Exh. 28). Toschi said that he was not retained because he was ranked in the 4th performance quartile,¹⁴ and received a written warning within the last six months.¹⁵ See (Tr. 90; R. Exh. 15). She defended that Tony Duke, another 4th quartile employee with pre-existing discipline, was also not retained.¹⁶ (Tr. 405).

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K. Hall's Employment History

In 2001, Hall began working for NCI in its DC office. She later transferred to the TX office in an in-house role. In 2009, she started working remotely out of her Dallas home. In June 2015, she moved from Dallas to San Antonio, and continued to work-at-home. She later returned to the TX office in a hybrid slot, where she mainly worked-at-home and worked in-house once per week. See also (R Exh. 45).

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1. Union Activities

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In April, Hall began encouraging coworkers to support the Union. She attended Union meetings, and averred that she was the sole captioner, who openly supported the Union. NCI became aware of these activities. On May 31, Toschi searched Spark and found a conversation between Hall and a coworker, where she rallied for unionization and called herself a "Union girl." (GC Exh. 6). On August 15, Chao identified Hall as a Union supporter. (GC Exh. 9). Toschi said that she knew about her actions. (Tr. 139).

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2. Disciplinary History

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a. Lateness and Missed Shifts Discipline

On February 18 and July 5, Hall was disciplined for missing her scheduled shifts. (GC Exh. 13; R. Exhs. 34, 37). The GC demonstrated that others missed their shifts, without disciplinary consequences. (GC Exhs. 46-47). Hall averred that her colleagues routinely arrived late, without discipline, and that NCI generally asked a coworker to stay longer for coverage.¹⁷

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b. Professionalism Discipline

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In March, Hall exchanged emails with Toschi, and complained that she had misled her about her leave accrual. (R. Exh. 11). In another email, Hall, who was seeking to bring a service dog to the office under the A.D.A., expressed frustration over NCI's delays. (GC Exh. 17; R. Exh. 35). Although she expressed irritation in both emails, she was not insubordinate.

¹⁴ Quartile rankings are created annually for each employee by department directors. Patterson stated that all trainees start off in the 4th quarter because they are less efficient.

¹⁵ NCI never eliminated his job and he was, thereafter, replaced with a new hire. (Tr. 324).

¹⁶ This was something of a red herring, inasmuch as Duke sought a long distance transfer to the DC office, which likely involved added moving costs, as opposed to a work-at-home job as was the case with Lukas.

¹⁷ This testimony has been credited. *First*, she was a credible witness, with a strong demeanor. *Second*, she openly admitting oversleeping (i.e., a detrimental fact), which aided her overall credibility. *Finally*, her testimony was consistent with NCI's documented failure to discipline others for similar transgressions. (GC Exhs. 46-47).

See also (R. Exh. 41). In June, one of her colleagues (the anonymous employee) complained to NCI that Hall had been sharing her private medical data.¹⁸ (GC Exh. 16). On June 12, Hall received a written warning for unprofessional conduct on the basis of these incidents. (GC Exh. 12).

c. Re-Application and Termination

Following the closure announcement, Hall applied for a remote captioner position. On August 23, she was told that “did not meet the minimum requirements,” and would be fired effective September 16. (GC Exh. 27). Toschi said that she rejected Hall because she was in the 4th performance quartile and received discipline in the last 6 months. See (R. Exh. 15). She concluded that she could not work remotely, even though she had done so for many years.¹⁹

L. Challenged Personnel Policies

1. Social Media Policy

On April 11, Patterson issued this memorandum to the voice writing department:

If you opt to post about your job on social media, it must be done responsibly ... [Here are] ... our guidelines

1. **Do not post about NCI's software.** A lot of our software ... was invented by NCI.... Don't post screenshots of our software ... and do not refer to any of our software by name. Avoid anything other than vague descriptions
2. **Do not identify clients by name** [D]on't post subjective commentary that could reflect poorly upon NCI's professionalism or reputation.
3. **Refrain from commenting on the quality of other captioning.**
4. **Don't use the NCI name on any posts that are Google-searchable.** Posts ... are Googleable... It is fine to list your job title and employer name on your social media profiles.
5. **You are NOT anonymous on the internet.** Online harassment ... [that does not] reflect well upon NCI [is prohibited]....

Please remember that these guidelines [will] ... protect you from inadvertently crossing a line because doing so could have serious consequences

¹⁸ Hall divulged medical information about the anonymous worker, while complaining about workplace coverage.

¹⁹ Toschi never explained this oddity, which deeply undercut her overall credibility.

(GC Exh. 33).

2. Unacceptable Behavior policy

In a June 25 email, NCI issued Hall a written warning, which described its *Unacceptable Behavior* policy and the following associated prohibitions:

- 1) Accusing NCI management of dishonesty and acting in bad faith in both direct communications to NCI management and to others in the company.
- 2) Complaining in an aggressive and hostile manner to management and co-workers
- 3) Spreading ... personal information about NCI employees.... [and]
- [4] [D]isparag[ing] and bully[ing] management

(GC Exh. 12).

III. ANALYSIS

A. §8(a)(1) Allegations

1. Social Media Policy²⁰

NCI's *Social Media* Policy violated §8(a)(1). The Board has held that an employer violates the Act, when it maintains rules that reasonably tend to chill §7 rights. See *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999). The Board has held that a rule is unlawful, if it "explicitly restricts [§7] activities." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004). However, if the rule does not explicitly restrict protected activities, it still violates the Act if, "(1) employees would reasonably construe the language to prohibit §7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of §7 rights." *Id.* at 647. The GC avers that the challenged rules would be reasonably construed by employees to bar §7 activity.

This policy is unlawful in several ways.²¹ *First*, it restricts employees from generating social media posts that do not "reflect well upon NCI," or "could reflect poorly on NCI's professionalism or reputation." The Board has found analogous social media and blogging policies unlawful, given that employees would reasonably construe them to ban their §7 right to collectively criticize their employer or workplace.²² *Second*, this policy improperly bans usage

²⁰ This allegation is listed under complaint pars. 6 and 11.

²¹ Although the GC contends that NCI's ban on commentary about competitors' captioning is unlawful, this contention is invalid. Banning employee commentary about competitors' captioning would not be reasonably construed by employees to prohibit their own legitimate §7 activities. This portion of the policy is, thus, valid.

²² See, e.g., *Costco Wholesale Corp.*, 358 NLRB 1100 (2012) (statements that damage Costco); *Knauf BMW*, 358 NLRB 1754 (2012) ("disrespectful" conduct and "language which injures the image ... of the Dealership."); *Sheraton Anchorage*, 362 NLRB No. 123, slip op. at 1 fn. 4 (2015); *Direct TV U.S. Holdings*, 362 NLRB No. 48 (2015); *Lily Transportation*, 362 NLRB No. 54, slip op. at 1 fns. 2, 3 (2015).

of NCI's name on any posts that are "Google-searchable," or "reference NCI, its operations, or its employees," which could reasonably be construed by employees to ban them from naming NCI in posts about their wages, hours or other terms and conditions of employment on any "Google-searchable" platform.²³ *Third*, it unlawfully bars employees, without qualification, from engaging in activities that NCI subjectively considers to be "online harassment," which could reasonably be construed by employees to bar online §7 activities such as solicitations to initially resistant coworkers to support the Union and lobbying of unsympathetic third parties to support a labor dispute.²⁴ *Fourth*, its software posting ban leaves no exception for software postings that do not reveal propriety matters, but, simultaneously touch upon collective concerns. Thus, for example, NCI's total software discussion ban would prohibit an employee's online posting about how difficult his job is due to the complexity of NCI's software, or prohibit a screen shot of wage data to be used for collective purposes. This ban, as a result, is overly broad and could reasonably be viewed by employees to restricting their §7 rights.²⁵

2. *Unacceptable Behavior Policy*²⁶

Multiple components of this policy, as described by Nubbe's June 15 email, are unlawful. *First*, this policy bars disrespectful workplace commentary, which could reasonably be construed by employees to ban statements of criticism of their employer.²⁷ *Second*, this policy, which bars "spreading ... personal information" about one's coworkers could reasonably be construed by employees to ban sharing wage and other workplace data for collective purposes.²⁸

3. *Toschi's Directive to Not to Discuss the Closure*²⁹

Her July 7 directive to not report the closure was unlawful because she failed to indicate how long this ban would be effective. See also (GC Exh. 25). Given that the TX office's closing was a key workplace issue, her warning to not discuss it for an unlimited duration with outside entities effectively banned employees from consulting with news and media organizations, contacting the Union, raising the matter with government agencies, or posting concerns on social media. This ban, therefore, unlawfully chilled their §7 right to discuss this key workplace issue with 3rd parties. See *Lutheran Heritage*, supra.

²³ See, e.g., *Costco*, supra; *Direct TV*, supra.

²⁴ Given that Board protects minor harassment, NCI's wholesale ban of all "online harassment" including protected minor harassment that is not misconduct is invalid. See *Pipe Realty Co.*, 313 NLRB 1289, 1290 (1994).

²⁵ See, e.g., *Cintas Corp.*, 344 NLRB 943 (2005), enfd. 482 F.3d 463 (D.C. Cir. 2007) (rule "protect[ing] the confidentiality of any information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters" could be reasonably construed by employees to restrict discussions of wages and other terms and conditions of employment with other employees and with the union).

²⁶ This allegation is listed under complaint pars. 7 and 11.

²⁷ See, e.g., *Casino San Pablo*, 361 NLRB No. 148 (2014); *Knauz BMW*, supra.

²⁸ See, e.g., *Costco Wholesale Corp.*, supra.

²⁹ This allegation is listed under complaint pars. 8(a) and 11.

4. Surveillance³⁰

NCI has engaged in unlawful surveillance since May 9. Regarding electronic surveillance of email, chat logs and other electronic communications, the Board has held that:

[Electronic] surveillance allegations [are addressed] by the same standards ... [as] surveillance in the bricks-and-mortar world. Board law establishes that “those who choose openly to engage in union activities at or near the employer's premises cannot be heard to complain when management observes them. The Board has long held that management officials may observe public union activity without violating the Act so long as those officials do not ‘do something out of the ordinary.’” An employer's monitoring of electronic communications on its email system will similarly be lawful so long as the employer does nothing out of the ordinary, such as increasing its monitoring during an organizational campaign or focusing its monitoring efforts on protected conduct or union activists. Nor is an employer ordinarily prevented from notifying its employees, ... that it monitors (or reserves the right to monitor) computer and email use for legitimate management reasons and that employees may have no expectation of privacy in their use of the employer's email system.

Purple Communications, 361 NLRB No. 126, slip op. at 15 (2014) (footnotes and citations omitted).

Toschi began searching Spark for Union references in May. She agreed that, before the Union campaign, she generally never searched Spark. Chao also began searching employees’ communications, once learning about the Union campaign. These searches were “out of the ordinary,” represented elevated “monitoring during an organizational campaign,” focused on protected conduct and were, thus, unlawful surveillance. *Purple Communications*, supra.

B. §8(a)(3) Allegations³¹

1. Lukas

a. July 12 Written Warning

Lukas’s written warning was unlawful. In assessing whether a personnel action violates §8(a)(3), the Board applies a mixed motive analysis. *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the GC must first demonstrate, by a preponderance of the evidence, that the worker’s protected conduct was a motivating factor in the adverse action. He satisfies this initial burden by showing: (1) the individual’s protected activity; (2) employer knowledge of such activity;

³⁰ The complaint was amended at the hearing to add an allegation that, since May 9, 2016, NCI has engaged in surveillance of employees’ union activities. (Tr. 242-43).

³¹ These allegations are listed under complaint pars. 9, 10 and 12.

and (3) animus. If the GC meets his initial burden, the burden shifts to the employer to prove that it would have taken the adverse action, even absent the protected activity. *Mesker Door*, 357 NLRB 591, 592 (2011). The employer cannot meet its burden, however, merely by showing that it had a legitimate reason for its action; rather, it must show that it would have taken the same action in the absence of the protected conduct. *Bruce Packing Co.*, 357 NLRB 1084, 1086–1087 (2011). If the employer’s proffered reasons are pretextual (i.e., either false or not actually relied on), it fails by definition to show that it would have taken the same action for those reasons regardless of the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007).

i. Prima Face Case

The GC satisfied his initial burden of showing that Lukas’s protected conduct was a motivating factor in the adverse action. He engaged in extensive Union activity; specifically, he supported the Union, was a member of its Facebook page, and was listed on it email rebuttal to Toschi. Toschi was consistently made aware of these activities. See (GC Exhs. 11, 19, 23, 24). There is also abundant evidence of Union animus, which includes the several personnel policies found unlawful herein, unlawful surveillance and Patterson’s openly hostile description of the employees who signed the Union’s email. Lastly, the close timing between Lukas’ Union activity and his written warning demonstrates animus. *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002), enfd. 71 Fed. Appx. 441 (5th Cir. 2003).

ii. NCI’s Response

NCI averred that it would have taken the adverse action against Lukas absent his protected activity. It argued that he breached his duty of loyalty by permitting Baker to overhear Toschi’s announcement, and that it would have disciplined anyone for this transgression.

iii. Analysis

NCI failed to demonstrate that it would have issued Lukas a written warning absent his Union activity. *First*, he did not knowingly breach a duty of loyalty. He was never given official notice that Toschi’s unique meeting, which he casually called on his day off, was confidential. As a result, he cannot be fairly held accountable for a breach, when the duty was neither obvious nor communicated. *Second*, Toschi’s overblown reaction to his relatively minor action rendered her stringent disciplinary measures suspect. Moreover, given that she repeatedly announced the TX office’s closure to her staff, clients and others without any legitimate confidentiality safeguards, her exaggeration that she was disgusted by Lukas’ leak seems overblown.³² Her actions appear even more arbitrary, once one considers: that there was no evidence presented that NCI lost a client or was otherwise harmed; and that Lukas had a statutory right to discuss the closure with coworkers, the Union or other third parties, whose

³² If Toschi genuinely wanted employees such as Lukas, who was off that day, to witness the meeting in a secured environment, she could have easily ordered them to attend in person or warned them to call in isolation. Her unwillingness to take these obvious steps undermines her contention that he knowingly breached a duty of loyalty.

collective support he may have chosen to later enlist. *Third*, the legitimacy of his written warning is further undercut by the substantial level of Union animus present herein. *Fourth*, Toschi's claim that she would have issued him a warning absent his Union activities is further eviscerated by her overall lack of candor regarding his Union activities.³³ *Fifth*, NCI's inexplicable unwillingness to cross-examine Lukas following his very strong direct testimony deeply bolstered all aspects of his testimony. Simply put, the legal decision to leave wide patches of testimony on several key points virtually unchallenged amounted to a concession that he should be credited over Toschi on such points. *Sixth*, NCI's failure to conduct a comprehensive investigation of his actions, by minimally interviewing him about his rationale before meting out punishment delegitimizes its actions. Or put another way, an evenhanded employer, would have first completed a comprehensive investigation before issuing discipline. NCI's decision to shoot first and ask questions later rendered its actions suspect. *Finally*, the fact that NCI had the very obvious option of just counseling Lukas about this unique scenario without disciplining him, given it was likely aware of the effect that such discipline might have on his post-closure retention suggests invidious treatment. In sum, based upon the foregoing reasons, i.e., *many of which suffice in isolation*, NCI failed to show that it would have issued Lukas a written warning, absent his Union activity. His written warning was, therefore, unlawful.

b. September 16 Discharge

Lukas' connected termination was unlawful. As noted, the GC presented a prima facie case, which established Union activity, knowledge and animus. Although NCI contended that it would have terminated Lukas absent his Union activity because he had a combined 4th quartile performance ranking and recent discipline, this argument is unreasonable because his written warning was unlawful and must now be treated as a non-factor. Moreover, given that it is undisputed NCI retained all employees with 4th quartile rankings and no discipline (see also (GC Exhs. 29-32)), it follows that he would have been retained absent his unlawful warning. His termination, which solely flowed from his unlawful warning, was, thus, unlawful.³⁴

2. Hall

a. June 15 Discipline

Hall's written warning was valid. As noted, her written warning stated, inter alia, that she, "violate[d] ... standard[s] of professionalism ... [by] spreading inaccurate and personal information about NCI employees." (GC Exh. 12).

³³ Her claim that she was unaware on July 11 (i.e. when his warning issued) that he was involved with the Union is "fake news," given that she was told by Patterson on June 23 that he was a member of the Union's Facebook page. (GC Exh. 11). Given her extensive surveillance, a claim that she failed to note his activities was implausible.

³⁴ This finding relies upon the same facts and analyses, which led to the finding that his warning was invalid.

i. Prima Face Case

The GC satisfied his initial burden that Hall's protected conduct was a motivating factor in the adverse action. She advocated for the Union and attended its meetings. NCI knew about these activities. There is also, as noted, abundant evidence of Union animus.³⁵

ii. NCI's Response and Analysis

NCI demonstrated, however, that it would have issued her a written warning, even absent her protected activity. It is undisputed that she spread detailed rumor, innuendo and information about a coworker's serious and private health condition on Spark. Given that NCI has an ongoing legal and moral obligation to protect the private health-related information of its employees, Hall's breach in this regard formed a fair and rational basis for her discipline. The anonymous employee, complained about her misconduct, which formed an independent basis for her discipline that was unconnected to her Union or other protected activities. The punishment of a written warning in this case seems to fit the crime, and NCI legitimately demonstrated that it would have issued a comparable punishment to a non-Union adherent.

b. September 16 Discharge

Hall's termination violated the Act. The GC, as noted, presented a prima facie case, which established Union activity, knowledge and animus. Although NCI averred that it legitimately refrained from offering Hall a position because she was in the 4th performance quartile and received a written warning in the last 6 months, this contention is unreasonable for several reasons. *First*, given that the stated goal of NCI's selection process was to fairly gauge who could effectively work remotely, it is irrational that it used its selection process to arbitrarily reject Hall, *who was already a proven and established remote worker*.³⁶ Simply put, NCI's claim that Hall, who had already been a remote worker for several years, "did not meet the minimum requirements," of a remote position is nonsensical. *Second*, it is equally inexplicable that NCI used its arbitrary process to retain employees, who had never worked remotely before, had less than a year of seniority and were in the 4th performance quartile (see, e.g., Victoria Verrando and Aaron Greenberg), over someone like Hall.³⁷ (GC Exhs. 29-32). *Third*, although NCI is contending that it applied a 2-part test to reject Hall (i.e., her performance ranking and disciplinary record), it initially communicated to employees that it would utilize a 5-part-test (i.e., productivity, quality, reliability, disciplinary record, and seniority). (GC Exh. 26). Its failure to satisfactorily explain why it used a 2-part test for Hall, when it first announced a 5-part test for everyone else, renders her handling suspect.³⁸ *Fourth*,

³⁵ The timing between her Union activity and warning also adduces animus. See *La Gloria Oil & Gas Co.*, *supra*.

³⁶ If Toschi truly believed that she was unqualified for remote work, she would have previously discharged her, instead of contradictorily employing her remotely on a long-term basis.

³⁷ NCI conspicuously failed to explain these inconsistencies, which eviscerates its position on Hall.

³⁸ Although NCI avers that its 5-part retention test was a legitimate and fair review, this proposition is misleading and invalid. The issue is not whether NCI created a valid retention test (i.e., it admittedly did); the issue is that it ignored its own test, and applied it to Hall in a deeply discriminatory manner. The violation herein flows from this lapse, and not the test itself, which, if properly applied, would likely be acceptable.

NCI failed to explain what weight, if any, it gave to Hall's other very positive factors (i.e., her substantial seniority, and long-term record of reliability and experience in a remote job).³⁹ Finally, Toschi's claim that she fairly evaluated Hall, without any consideration of her Union activities, and blindly treated her the same way that she would have handled an employee without Union activity is unreliable.⁴⁰ On these bases, many of which independently suffice, NCI failed to show that it would have terminated Hall, absent her protected activity. Her firing was, thus, invalid.

CONCLUSIONS OF LAW

1. NCI is an employer engaged in commerce within the meaning of §2(2), (6), and (7) of the Act.

2. NCI violated §8(a)(1) by:

a. Maintaining a *Social Media* policy, which: prohibits employees from creating social media posts that "do.... not reflect well upon NCI," "could reflect poorly on NCI's professionalism or reputation," or "reflect poorly on or cause trouble for NCI;" bans the usage of NCI's name on any posts that are "Google-searchable," and those that "reference NCI, its operations, or its employees;" bars employees from engaging in activities that it considers to be "online harassment," without qualification; and bans employees from posting anything "about its software," without qualification.

b. Maintaining an *Unacceptable Behavior* policy, which prohibits: disrespectful workplace commentary; and "spreading ... personal information" about one's coworkers without citing an exception for wage and other personnel data.

c. Directing employees to not report the TX office's closure on July 7, 2016, without any qualification regarding duration.

d. Engaging in surveillance of employees' Union and other protected activities in emails, chat room logs and other electronic communications since May 9, 2016.

3. NCI violated §8(a)(3) by issuing Lukas a warning and later discharging him.

4. NCI violated §8(a)(3) by discharging Hall.

³⁹ Hall was hired in 2001, and ranked 3rd in seniority amongst the TX office employees. (GC Exhs. 29-32). NCI failed to explain how, if at all, her seniority level was weighed. This failure was astonishing, given that NCI appears to have a high turnover (i.e., 16 of 21 employees in voice-writing and broadcasting were hired in 2014 or sooner). (Id.) Given this high turnover, her near-best, seniority rate should have weighed heavily in favor of her retention. The fact that it was ignored suggests invidious treatment.

⁴⁰ This claim is untrustworthy for many reasons. *First*, Toschi misrepresented her awareness of Lukas' Union activities, and then unlawfully disciplined him and fired him on this basis. *Second*, she came across as a highly practiced witness with a poor demeanor, who was more focused on adhering to her mental script than providing true testimony. *Third*, her claim of evenhandedness is undercut by the extensive record of Union animus found herein.

5. The unfair labor practices set forth above affect commerce within the meaning of §2(6) and (7) of the Act.

5

REMEDY

Having found that NCI committed unfair labor practices, it is ordered to cease and desist and to take certain affirmative action designed to effectuate the Act's policies.

10 Regarding its unlawful personnel policies, it must rescind the overbroad Handbook rules, and furnish all current employees with inserts for their current Handbooks that (1) advise that the unlawful rule has been rescinded, or (2) provide a lawfully worded rule on adhesive backing that will cover the unlawful rule; or publish and distribute to all current employees revised Handbooks that (1) do not contain the unlawful rule, or (2)
15 provide a lawfully worded rule. Given that its unlawful policies are maintained on a companywide basis, it shall be ordered to post a notice at all of its facilities where the unlawful policy has been, or is, in effect. See *Longs Drug Stores California, Inc.*, 347 NLRB 500, 501 (2006); *Guardsmark LLC*, 344 NLRB 809, 812 (2005).

20 Regarding its unlawful disciplinary actions and firings, it is ordered to offer Lukas and Hall full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. It is further ordered to make them whole for any loss of earnings and other benefits suffered as a result of their discrimination. Backpay shall be computed in accordance
25 with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Moreover, in accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), Respondent shall compensate them for their search-for-work and interim employment expenses, if any, regardless of whether those expenses exceed interim earnings.
30 Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. It is further ordered to compensate them for any adverse tax consequences associated with receiving a lump-sum backpay award and to file with the Regional Director for Region 16 a report allocating the backpay award to the
35 appropriate calendar year. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). It is also ordered to remove from its files any references to the unlawful warning and discharges, and within 3 days thereafter to notify them in writing that this has been done and that their discipline will not be used against them in any way. It shall also post the attached notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010).

40

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended⁴¹

⁴¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

NCI, its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Maintaining a *Social Media* policy, which: prohibits employees from creating social media posts that “do.... not reflect well upon NCI,” “could reflect poorly on NCI’s professionalism or reputation,” or “reflect poorly on or cause trouble for NCI;” bans the usage of NCI’s name on any posts that are “Google-searchable,” and those that “reference NCI, its operations, or its employees;” bars employees from engaging in activities that NCI subjectively considers to be “online harassment,” without qualification; and bans employees from posting anything “about its software,” without qualification.

b. Maintaining an *Unacceptable Behavior* policy, which bars: disrespectful workplace commentary; and “spreading ... personal information” about one’s coworkers, without citing an exception for wage and other personnel data.

c. Directing employees to not report the TX office’s closure, without any qualification regarding duration.

d. Engaging in surveillance of employees’ Union and other protected activities in their email messages, chat room logs and other electronic communications.

e. Issuing written warnings, discharging, or otherwise discriminating against its employees on the basis of their union or other protected concerted activities.

f. In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

a. Rescind or modify the language in the *Social Media* policy to the extent that it: prohibits employees from creating social media posts that “do.... not reflect well upon NCI,” “could reflect poorly on NCI’s professionalism or reputation,” or “reflect poorly on or cause trouble for NCI;” bans the usage of NCI’s name on any posts that are “Google-searchable,” and those that “reference NCI, its operations, or its employees;” bars employees from engaging in activities that NCI subjectively considers to be “online harassment,” without qualification; and bans employees from posting anything “about its software,” without qualification.

b. Rescind or modify the language in the *Unacceptable Behavior* policy to the extent that it bars disrespectful workplace commentary and prohibits “spreading ... personal information” about coworkers without citing an exception for wage and other workplace data.

that c. Furnish all current employees with inserts for the Employee Handbook

5 1. Advise that the unlawful rule has been rescinded, or

2. Provide the language of lawful rule or publish and distribute a revised Employee Handbook that

10 i. Does not contain the unlawful rule, or

ii. Provides the language of lawful rule.

d. Within 14 days from the date of this Order, offer Lukas and Hall full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

e. Make Hall and Lukas whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

f. Compensate these employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

g. Within 14 days from the date of this Order, remove from its files any reference to these unlawful discharges and Lukas' unlawful written warning, and within 3 days thereafter, notify them in writing that this has been done and that their discharges and discipline will not be used against them in any way.

h. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

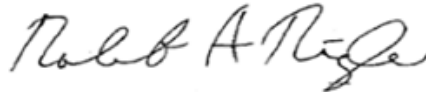
i. Within 14 days after service by Region 16, post at its CA and DC offices copies of the attached notice marked "Appendix."⁴² Copies of the notice, on forms provided by the Regional Director, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous

⁴² If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at any time since April 11, 2016.

j. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that it has taken to comply.

Dated Washington, D.C. September 18, 2017



Robert A. Ringler
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT maintain a *Social Media* policy, which: prohibits employees from creating social media posts that “do.... not reflect well upon NCI,” “could reflect poorly on NCI’s professionalism or reputation,” or “reflect poorly on or cause trouble for NCI;” bans the usage of NCI’s name on any posts that are “Google-searchable,” and those that “reference NCI, its operations, or its employees;” bars employees from engaging in activities that NCI subjectively considers to be “online harassment,” without qualification; and bans employees from posting anything “about its software,” without qualification.

WE WILL NOT maintain an *Unacceptable Behavior* policy, which bars disrespectful workplace commentary and “spreading ... personal information” about one’s coworkers without citing an exception for wage and other workplace data.

WE WILL NOT tell you to not report the closure of your office, as we did in the case of the closure of the Texas office, without any qualification regarding the duration of our direction.

WE WILL NOT engage in surveillance of Union and other protected activities in your emails, chat room logs, the Spark system, or other electronic communications.

WE WILL NOT discharge, discipline or otherwise discriminate against you for participating in Union or any other protected concerted activities

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights set forth above.

WE WILL rescind or modify the language in our *Social Media* policy to the extent that it: prohibits employees from creating social media posts that “do.... not reflect well upon NCI,” “could reflect poorly on NCI’s professionalism or reputation,” or “reflect poorly on or cause

trouble for NCI;" bans the usage of NCI's name on any posts that are "Google-searchable," and those that "reference NCI, its operations, or its employees;" bars employees from engaging in activities that NCI subjectively considers to be "online harassment," without qualification; and bans employees from posting anything "about its software," without qualification.

WE WILL rescind or modify the language in our *Unacceptable Behavior* policy to the extent that it bars disrespectful workplace commentary and "spreading ... personal information" about one's coworkers without citing an exception for wage and other workplace data.

WE WILL furnish all of you with inserts for the current Employee Handbook that:

1. Advise that the unlawful provisions, above have been rescinded, or
2. Provide the language of lawful provisions, or publish and distribute revised Employee Handbooks that:
 - a. Do not contain the unlawful provision, or
 - b. Provide the language of a lawful provision.

WE WILL within 14 days from the date of the Board's Order, offer Mike Lukas and Janice Marie Hall full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Lukas and Hall whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate Lukas and Hall for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and **WE WILL** file with the Regional Director, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for these employees.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Lukas and Hall and the unlawful written warning issued to Lukas, and **WE WILL**, within 3 days thereafter, notify them in writing that this has been done and that their discharges and discipline will not be used against them in any way.

NATIONAL CAPTIONING INSTITUTE, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

819 Taylor Street, Room 8A24, Fort Worth, TX 76102-6178
(817) 978-2921, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/16-CA-182528 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (817) 978-2941.